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In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, PETITIONER

v.

EUGENE DIFRANCESCO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-45a) is reported at 604 F.2d 769.

JURISDICTION

The judgment of the court of appeals (Pet. App. 46a-47a) was entered on August 6, 1979. Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including October 5, 1979. The petition for a writ of certiorari was filed on that date and was granted on February 19, 1980.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the provision of 18 U.S.C. 3576 that permits the United States to seek appellate review of a sentence imposed by a district court under 18 U.S.C. 3575 violates the Double Jeopardy Clause.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> * * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb * * *.

2. 18 U.S.C. 3575 provides in pertinent part:

> (b) Upon any plea of guilty or nolo contendere or verdict or finding of guilty of the defendant of such felony, a hearing shall be held before sentence is imposed, by the court sitting without a jury. The court shall fix a time for the hearing, and notice thereof shall be given to the defendant and the United States at least ten days prior thereto. The court shall permit the United States and counsel for the defendant, or the defendant if he is not represented by counsel, to inspect the presentence report sufficiently prior to the hearing as to afford a reasonable opportunity for verification. * * * In connection with the hearing, the defendant

and the United States shall be entitled to assistance of counsel, compulsory process, and cross-examination of such witnesses as appear at the hearing. A duly authenticated copy of a former judgment or commitment shall be prima facie evidence of such former judgment or commitment. If it appears by a preponderance of the information, including information submitted during the trial of such felony and the sentencing hearing and so much of the presentence report as the court relies upon, that the defendant is a dangerous special offender, the court shall sentence the defendant to imprisonment for an appropriate term not to exceed twenty-five years and not disproportionate in severity to the maximum term otherwise authorized by law for such felony. Otherwise it shall sentence the defendant in accordance with the law prescribing penalties for such felony. The court shall place in the record its findings, including an identification of the information relied upon in making such findings, and its reasons for the sentence imposed.

* * * * *

(e) A defendant is a special offender for purposes of this section if—

* * * * *

(3) such felony was, or the defendant committed such felony in furtherance of, a conspiracy with three or more other persons to engage in a pattern of conduct criminal under applicable laws of any jurisdiction,

and the defendant did, or agreed that he would, initiate, organize, plan, finance, direct, manage, or supervise all or part of such conspiracy or conduct, or give or receive a bribe or use force as all or part of such conduct.

* * * * *

For purposes of paragraphs (2) and (3) of this subsection, criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.

(f) A defendant is dangerous for purposes of this section if a period of confinement longer than that provided for such felony is required for the protection of the public from further criminal conduct by the defendant.

3. 18 U.S.C. 3576 provides:

With respect to the imposition, correction, or reduction of sentence after proceedings under section 3575 of this chapter, a review of the sentence on the record of the sentencing court may be taken by the defendant or the United States to a court of appeals. Any review of the sentence taken by the United States shall be taken at least five days before expiration of the time for taking a review of the sentence or appeal of the conviction by the defendant and shall be

diligently prosecuted. The sentencing court may, with or without motion and notice, extend the time for taking a review of the sentence for a period not to exceed thirty days from the expiration of the time otherwise prescribed by law. The court shall not extend the time for taking a review of the sentence by the United States after the time has expired. A court extending the time for taking a review of the sentence by the United States shall extend the time for taking a review of the sentence or appeal of the conviction by the defendant for the same period. The taking of a review of the sentence by the United States shall be deemed the taking of a review of the sentence and an appeal of the conviction by the defendant. Review of the sentence shall include review of whether the procedure employed was lawful, the findings made were clearly erroneous, or the sentencing court's discretion was abused. The court of appeals on review of the sentence may, after considering the record, including the entire presentence report, information submitted during the trial of such felony and the sentencing hearing, and the findings and reasons of the sentencing court, affirm the sentence, impose or direct the imposition of any sentence which the sentencing court could originally have imposed, or remand for further sentencing proceedings and imposition of sentence, except that a sentence may be made more severe only on review of the sentence taken by the United States and after hearing. Failure

> of the United States to take a review of the imposition of the sentence shall, upon review taken by the United States of the correction or reduction of the sentence, foreclose imposition of a sentence more severe than that previously imposed. Any withdrawal or dismissal of review of the sentence taken by the United States shall foreclose imposition of a sentence more severe than that reviewed but shall not otherwise foreclose the review of the sentence or the appeal of the conviction. The court of appeals shall state in writing the reasons for its disposition of the review of the sentence. Any review of the sentence taken by the United States may be dismissed on a showing of abuse of the right of the United States to take such review.

STATEMENT

Following a jury trial in the United States District Court for the Western District of New York, respondent was convicted of conducting the affairs of an enterprise through a pattern of racketeering activities and of conspiring to commit that offense, in violation of 18 U.S.C. 1962(c) and (d) (Pet. App. 2a). Following a subsequent unrelated jury trial in the same district, respondent was convicted of damaging federal property, in violation of 18 U.S.C. 1361, unlawfully storing explosive materials, in violation of 18 U.S.C. 842(j), and conspiring to commit those offenses, in violation of 18 U.S.C. 371 (*ibid.*). He

was first sentenced on the convictions arising from the second trial and given a total of nine years' imprisonment.[1] He was subsequently sentenced under the provisions of 18 U.S.C. 3575 to two ten-year terms of imprisonment on the racketeering counts involved in the first trial, to be served concurrently with each other and with the nine-year sentence imposed at the second trial. Respondent appealed from both convictions, and the government appealed under 18 U.S.C. 3576 from the sentence imposed at the racketeering trial. The court of appeals affirmed respondent's convictions and dismissed the government's appeal (Pet. App. 1a-45a).

The evidence at the racketeering trial showed that respondent was involved in an arson-for-hire scheme in the Rochester, New York, area that was responsible for at least eight fires between 1970 and 1973 (Pet. App. 3a). The arson ring agreed with property owners to set fire to their buildings in return for a share of the insurance proceeds. Pursuant to this scheme, insurance companies were defrauded of approximately $480,000 (*ibid.*). The evidence in the second trial showed that respondent had participated in the series of bombings known as the "Columbus

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[1] The court sentenced respondent to concurrent terms of eight years' imprisonment on the damaging federal property charge and five years' imprisonment on the conspiracy charge, to be followed by a one-year term of imprisonment on the charge of unlawful storage of dynamite (C.A. Resp. App. 9). ("C.A. Resp. App." refers to the appendix filed by the respondent in the court of appeals).

Day Bombings," which occurred on October 12, 1970, and included the bombing of the Federal Building in Rochester, New York (Pet. App. 2a, 16a n.8).

18 U.S.C. 3575 permits the government to seek an enhanced sentence of up to 25 years' imprisonment for a defendant who can be classified as a dangerous special offender as defined in 18 U.S.C. 3575(e) and (f). In order to invoke this section, the government must file a notice prior to trial of its intent to do so. If a guilty verdict is returned, a hearing is held after trial in which the court determines whether the defendant meets the statutory criteria for classification as a dangerous special offender. 18 U.S.C. 3576 provides for review of a sentence imposed under 18 U.S.C. 3575 at the instance of either the defendant or the government. The court of appeals is empowered to review "whether the procedure employed was lawful, the findings made were clearly erroneous, or the sentencing court's discretion was abused."

On September 12, 1977, prior to respondent's first trial, the government filed a notice with the district court, pursuant to 18 U.S.C. 3575(a), alleging that respondent was a "dangerous special offender" as defined in 18 U.S.C. 3575(e)(3) and (f). The notice indicated the government's intention, in the event respondent was convicted, to seek imposition of an enhanced sentence under 18 U.S.C. 3575(b) on the racketeering counts (Pet. App. 20a). On October 31, 1977, respondent was found guilty of the charges. On March 17, 1978, the dangerous special offender

hearing was held in compliance with 18 U.S.C. 3575(b) (A. 17-32). At the hearing, the government relied upon the testimony adduced at trial and upon certain public documents that attested to other convictions of respondent for the bombings, for loansharking, and for murder (A. 27-28, 30). Respondent's counsel conceded the validity of the government's public records and offered no evidence (A. 31-32). He did, however, object to any consideration of respondent's murder conviction, which had been reversed on appeal (A. 28-29).

On April 21, 1978, the district court issued findings of fact and ruled that respondent was a dangerous special offender within the meaning of 18 U.S.C. 3575 (A. 33-34). The findings reviewed respondent's criminal history in detail and concluded that it revealed "a history of virtually continuous criminal conduct over the past eight years, interrupted only by relatively brief periods of imprisonment in 1975, 1976 and 1977" (A. 41). In addition, the court found that respondent's "criminal history, based upon proven facts, reveals a pattern of habitual and knowing criminal conduct of the most violent and dangerous nature against the lives and property of the citizens of this community. It further shows the [respondent's] complete and utter disregard for the public safety. The [respondent], by virtue of his own criminal record, has shown himself to be a hardened habitual criminal from whom the public must be protected for as long a period as possible. Only

in that way can the public be protected from further violent and dangerous criminal conduct by the [respondent]" (A. 43). On April 28, 1978, the court sentenced respondent, pursuant to 18 U.S.C. 3575, to concurrent terms of 10 years' imprisonment on the racketeering charges, to be served concurrently with the nine-year sentence that had already been imposed on March 17, 1978, in connection with his other trial on the bombing charges (A. 45-46).

Under the authority granted by 18 U.S.C. 3576, the government appealed from the dangerous special offender sentence, claiming that the district court abused its discretion in imposing a sentence that would lead, in effect, to additional imprisonment for only one year despite its findings after the dangerous special offender hearing (Pet. App. 21a-22a). The court of appeals dismissed the appeal for lack of jurisdiction on the ground that Section 3576 violates the Double Jeopardy Clause.[2] The court found that

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[2] The concurring opinion of Judge Haight suggested that the government's appeal should have been dismissed because 18 U.S.C. 3575 and 3576 were inapplicable to respondent (Pet. App. 44a-45a). The majority of the court disagreed, finding that Section 3575 could properly have been applied to respondent (Pet. App. 23a-24a n.13). In any event, that issue is not presented here. The court of appeals held that it lacked jurisdiction to entertain the government's appeal because of the unconstitutionality of Section 3576. Until jurisdiction is established, a court cannot consider the merits of the issues presented to it for resolution. See *Alabama Public Service Comm'n* v. *Southern Ry.*, 341 U.S. 341, 347 (1951). If this Court determines that the Double Jeopardy Clause does not prohibit the court of appeals from taking jurisdiction of the government's appeal, the court of appeals may consider on remand whether the statute is applicable to respondent.

this case was indistinguishable in principle from *Kepner* v. *United States*, 195 U.S. 100 (1904) (Pet. App. 29a-30a). In addition, the court relied upon a number of statements in dicta by this Court and the courts of appeals (*id.* at 33a-36a) that suggest that "the double jeopardy clause bars an increase in the sentence imposed by the district court" (*id.* at 36a). Accordingly, the court concluded that "to subject a defendant to the risk of substitution of a greater sentence, upon an appeal by the government, is to place him a second time 'in jeopardy of life or limb' " (Pet. App. 30a).

SUMMARY OF ARGUMENT

In this case the court of appeals has concluded that a statute expressly authorizing the government to appeal a sentence under the dangerous special offender law violates the Double Jeopardy Clause. This Court has never invalidated an Act of Congress on double jeopardy grounds, and the decision of the court of appeals significantly circumscribes the authority of Congress to legislate with respect to sentencing. The court's holding defeats the specific intent of Congress that district courts not be afforded final sentencing authority when dealing with individuals defined as dangerous special offenders under the statute. Moreover, it jeopardizes the ability of Congress to respond to one of the most widely recognized problems of our present sentencing system—the frequent and substantial disparities in sentences imposed on similarly

situated offenders—by resort to appellate review of sentences. Neither the history nor the policy of the Double Jeopardy Clause supports such an irrational restriction on legislative authority to improve the fairness and rationality of the administration of criminal justice.

A. It is by now well settled that the Double Jeopardy Clause does not generally operate as a barrier to prosecution appeals in criminal cases. *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 569-570 (1977); *United States* v. *Wilson*, 420 U.S. 332, 342 (1975). Thus, the Clause does not ordinarily confer upon a defendant the right to retain a favorable but erroneous disposition of his case by the trial court. For example, a dismissal with prejudice after verdict (*Wilson, supra*) or even during trial (*United States* v. *Scott*, 437 U.S. 82 (1978)), although a total victory for the defendant at the trial level, may be overturned on the government's appeal. Appeal is foreclosed only in that special category of cases in which the relief requested of the appellate court by the prosecution (specifically, a new trial following an acquittal) would violate the Double Jeopardy Clause. Even then, it is the relief sought, not the appeal itself, that offends the Constitution.

B. Accordingly, the statutorily authorized sentence appeal in the instant case can violate double jeopardy principles only if the initial pronouncement of sentence clothes a defendant with the same immunity from further consideration of an appropriate sen-

tence as a verdict of acquittal does with respect to further trial proceedings inquiring into his guilt or innocence. In other words, only if the pronouncement of sentence amounts to an "implied acquittal" of any greater sentence and the appeal amounts to a further "trial" does a basis exist for contending that the Double Jeopardy Clause is offended by the appeal. There is, however, no basis in either precedent or policy for making such an equation and therefore no basis for the court of appeals' conclusion that the prohibition of *Kepner* v. *United States*, 195 U.S. 100 (1904), against an appellate redetermination of guilt or innocence following an acquittal at trial governs the present case.

When a jury returns a verdict of not guilty, the Double Jeopardy Clause absolutely bars the sovereign from thereafter pursuing the same charge against the defendant. The pronouncement of sentence, however, has never carried the same quality of finality. At common law and in American practice at and after the adoption of the Constitution, a sentence could be increased at any time during the term of court in which it was imposed. Moreover, this Court has specifically held that the Double Jeopardy Clause does not preclude imposition of a higher sentence at a second trial for an offense than was imposed following the first trial (*North Carolina* v. *Pearce*, 395 U.S. 711 (1969)) or the correction of a sentence that is legally erroneous by virtue of omission of a mandatory punishment (*Bozza* v. *United States*, 330 U.S. 160 (1947)). The court of appeals' attempt

to distinguish *Pearce's* seemingly dispositive holding on the lack of nexus between double jeopardy and imposition of an increased sentence on a theory that the defendant waived his protection against an increased sentence by appealing his original conviction is untenable. It would be manifestly unfair to condition the defendant's opportunity to assert other rights upon his waiver of double jeopardy protections, and the Court has specifically rejected this waiver analysis. *Green* v. *United States*, 355 U.S. 184 (1957).

Apart from these precedents, moreover, the equation of sentencing with trial is fundamentally unsound. The embarrassment and emotional ordeal of trial is a unique burden materially different in character from the stresses associated with sentencing or with other aspects of the criminal justice process—and, a fortiori, from appellate review proceedings. And the possibility of review of a sentence does not implicate in any way the concern of the Double Jeopardy Clause to guard against the risk of conviction of an innocent person through repeated prosecutions for the same offense. It is for this reason that the Court has stressed the uniqueness of the double jeopardy bar to appeal of acquittals (*United States* v. *Scott*, *supra*, 437 U.S. at 91), that it has found conviction of a lesser offense to be an implied acquittal of the greater barring reprosecution on the greater (*Green*) while refusing to conclude that imposition of a particular sentence implicitly "acquits" the defendant of exposure to any greater sentence

(*Pearce*), and that it has prohibited a retrial after entry of an acquittal that was beyond the authority of the trial court (*Fong Foo* v. *United States*, 369 U.S. 141 (1962)) while allowing a legally improper sentence to be corrected (*Bozza*).

C. The Double Jeopardy Clause has also been said to protect individuals against multiple punishment for a single offense. We have difficulty perceiving any sense in which it could reasonably be said that an increase in respondent's sentence resulting from a statutorily authorized appeal would constitute double punishment, so long as the sentence, as increased, remains within statutory limits. Certainly, the situation would be wholly unlike *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873), in which the trial court had ordered both fine and imprisonment although the statute permitted only one of those sanctions to be imposed.

It is true that, in the absence of any statutory regulation of the matter, it has come to be generally held that the power of a trial court to increase a sentence ends at the time the defendant commences service of that sentence. While dictum in *United States* v. *Benz*, 282 U.S. 304 (1931), states that this rule is constitutionally required in order to avoid multiple punishment, the basis for this conclusion is far from clear. Perhaps there would be some ground for a double punishment finding where the defendant has completed service of a sentence prior to its increase, but commencement of service is a wholly

fortuitous circumstance that has no nexus to any substantial interest of a defendant protected by the Double Jeopardy Clause.

D. This Court's double jeopardy analysis has generally taken pains to consider substance rather than form. Here, the substance is that the district courts have power to enter only tentative sentences of dangerous special offenders, but that final sentencing authority resides in the appellate courts. The procedure is thus quite similar to that upheld by this Court with regard to the determination of guilt or innocence in *Swisher* v. *Brady*, 438 U.S. 204 (1978). Were Congress to require district courts to sentence persons such as respondent to the maximum term, subject to reduction by the court of appeals on recommendation of the district court, there would be no possible foothold for a double jeopardy objection. The formal differences between such an indisputably valid scheme and the one Congress has adopted in Section 3576 do not implicate any substantial individual rights that bear upon the values served by the Double Jeopardy Clause.

E. Finally, it must be noted that the present system of sentencing has come under strong attack from responsible quarters because the unreviewable sentencing power of individual judges has produced wide disparities in sentences meted out to similarly situated offenders. Appellate review of sentencing is one obvious means of bringing needed uniformity to this aspect of the criminal justice system—a means that cannot be fully effective to achieve its ends un-

less available to the prosecution as well as the defense, since excessively lenient sentences are as much a part of the perceived inequity of the present system as excessively harsh ones. There is nothing in the history or policies of the Double Jeopardy Clause that justifies depriving the legislature of this tool for reform of the criminal justice system.

ARGUMENT

THE DOUBLE JEOPARDY CLAUSE DOES NOT BAR CONGRESS FROM AUTHORIZING GOVERNMENT APPEAL OF SENTENCES

In the present case the district court, after a hearing, concluded that respondent was a dangerous special offender, as that concept is defined in 18 U.S.C. 3575, characterizing him as "a hardened habitual criminal from whom the public must be protected for as long a period as possible" (A. 43). Notwithstanding that conclusion, however, a week later the court imposed a sentence that effectively amounted to only one year's imprisonment beyond that already imposed in a separate case. The United States' statutorily authorized appeal asserted that the sentence imposed constituted an abuse of the district court's discretion. Since the court of appeals dismissed the appeal for lack of jurisdiction and did not reach the merits of this contention, it must be assumed for present purposes that the district court in fact committed legal error by abusing its sentencing discretion, and that it was legally obliged on the record

before it to impose a more severe sentence in the first instance. The question is whether the Double Jeopardy Clause bars correction of such an error by means of a statutorily authorized appeal to the court of appeals.

We argue herein that the congressional judgment to allow prosecution appeals of sentences in certain prescribed circumstances represents a soundly conceived step toward the goal of a more rational criminal justice system and that such appeals are consistent with the policies embodied in the Double Jeopardy Clause. This Court has never previously invalidated any Act of Congress on double jeopardy grounds, and this is no place to begin.

A. The Double Jeopardy Clause Is Not Addressed To Restricting Government Appeals

It is by now well settled that the Double Jeopardy Clause does not generally operate as a barrier to appeals by the prosecution in criminal cases. As the Court said in *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 569-570 (1977), "where a Government appeal presents no threat of successive prosecutions, the Double Jeopardy Clause is not offended." In *United States* v. *Wilson*, 420 U.S. 332 (1975), the trial court dismissed the indictment on the ground of excessive pre-indictment delay after the jury had entered a guilty verdict. Noting that the Double Jeopardy Clause is "directed at the threat of multiple prosecutions, not at Government appeals, at least where those appeals would not require a new trial" (420 U.S. at 342), the Court held the Constitution

did not bar a government appeal of that dismissal. In *United States* v. *Scott*, 437 U.S. 82 (1978), the Court held that the government could appeal such a dismissal even if it was made during trial.[3]

It is thus evident that the government's appeal of respondent's sentence cannot offend double jeopardy principles on the ground that its success would deprive respondent of the benefit (undoubtedly significant to him) of a more lenient sentence. In cases like *Wilson* and *Scott*, the defendant had won a total victory in that the trial court had terminated the case in a manner that would have allowed him to go free, yet the government was permitted to appeal the order.[4]

There is, of course, one specific category of cases in which government appeal is effectively foreclosed by the Double Jeopardy Clause—*i.e.*, those cases in which the appeal follows an acquittal and success on the appeal would require a new trial. In such cases, the relief requested would offend the principal protection of the Double Jeopardy Clause, that against successive prosecutions. See *Sanabria* v. *United*

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[3] Even acquittals are not wholly immune from prosecution appeals. In accordance with the reasoning employed by this Court, the courts of appeals have uniformly held that the government may appeal post-guilty-verdict acquittals. See, *e.g.*, *United States* v. *Rojas*, 554 F.2d 938, 941-942 (9th Cir. 1977); *United States* v. *De Garces*, 518 F.2d 1156 (2d Cir. 1975). See also *United States* v. *Jenkins*, 420 U.S. 358, 365 (1975).

[4] Success by the government in such an appeal would in effect increase the defendant's sentence from nothing to something, yet that consideration plainly was not thought to have any bearing on the permissibility of the appeal.

States, 437 U.S. 54, 63 (1978); *United States* v. *Martin Linen Supply Co., supra.* Even in this class of cases, however, it cannot properly be said that the appeal itself offends the Double Jeopardy Clause; rather, the appeal is barred by the case or controversy requirement of Article III.

B. The Double Jeopardy Clause Does Not Clothe Sentences With Unreviewable Finality

Since it is not a prosecution appeal itself that can fall afoul of the Double Jeopardy Clause, but rather the relief requested by the appeal, it must next be considered whether a criminal sentence, once pronounced, must be accorded constitutional finality similar to that attaching to a jury's verdict of not guilty. Neither the history of sentencing practices, the pertinent holdings of this Court, nor considerations of double jeopardy policy supports such an equation.

The special rule that has evolved respecting the finality of an acquittal by the fact-finder in a criminal case reflects the fact that the prohibition against multiple trials is the " 'controlling constitutional principle' " of the Double Jeopardy Clause. *United States* v. *Martin Linen Supply Co., supra*, 430 U.S. at 569. See, *e.g.*, *United States* v. *Jorn*, 400 U.S. 470, 479 (1971) (plurality opinion); *Green* v. *United States*, 355 U.S. 184, 187-188 (1957). Even the protection against retrials, however, is not absolute. A defendant may be retried, for example, when a mistrial is declared in his first trial for reasons of "manifest

necessity," such as a hung jury, *United States* v. *Perez*, 22 U.S. (9 Wheat.) 579 (1824), when a trial is erroneously terminated at the defendant's behest prior to verdict on grounds unrelated to guilt or innocence, *United States* v. *Scott*, 437 U.S. 82 (1978), when a conviction is reversed on appeal, *United States* v. *Ball*, 163 U.S. 662 (1896), or even when a final judgment of conviction is set aside on collateral attack, *United States* v. *Tateo*, 377 U.S. 463 (1964). But when a defendant has been acquitted by a jury on the facts, he may not be retried even if legal error was committed at the trial. *United States* v. *Ball*, *supra*.[5] This rule has been characterized as attaching "particular significance to an acquittal" (*United States* v. *Scott*, *supra*, 437 U.S. at 91), and it has been justified on the basis that "[t]o permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that 'even though innocent he may be found guilty.' " *Ibid.*

Thus, appeal of a sentence would seem to be a violation of double jeopardy only if the original pronouncement of sentence is to be treated in the same way as an acquittal and the appeal is to be treated as a retrial. The court of appeals apparently took

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[5] The Court has indicated that the same rule obtains with respect to the factual determination by a judge in a bench trial, where the judge acts as factfinder instead of the jury. See *United States* v. *Martin Linen Supply Co.*, *supra*, 430 U.S. at 573 n.12.

precisely this position in relying primarily on *Kepner* v. *United States*, 195 U.S. 100 (1904), which focuses on this special situation of a retrial after acquittal. *Kepner* involved an appeal taken from an acquittal in a bench trial in the courts of the Philippine Islands, which were being administered by the United States at that time.[6] The appeal in *Kepner* was not an ordinary appeal of a legal ruling made by the trial judge; rather, it involved what was essentially a trial de novo on the facts in the appellate court. See *United States* v. *Wilson*, *supra*, 420 U.S. at 346. This Court, noting that the primary protection of double jeopardy is "against being again tried for the same offense" (195 U.S. at 130), held that the government could not "appeal" Kepner's acquittal because to do so would be to "try him again on the merits * * * in an appellate court." 195 U.S. at 133.

The court of appeals held that the rationale of *Kepner* applies equally to a government appeal of a sentence under 18 U.S.C. 3576 and that the Double Jeopardy Clause bars such an appeal. The court stated (Pet. App. 30a):

> We cannot perceive, however, how a defendant who, after being sentenced to several years' im-

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[6] *Kepner* involved a construction of an Act of Congress applicable to the Philippines, rather than the Double Jeopardy Clause, and this Court has held that decisions interpreting the double jeopardy provisions of that Act are not to be treated as conclusive determinations of constitutional law. *Green* v. *United States*, 355 U.S. 184, 197 & n.16 (1957). However, *Kepner* has been treated as having correctly stated the relevant double jeopardy principles. *United States* v. *Wilson*, *supra*, 420 U.S. at 346 n.15.

> prisonment by a district court, might be subject to imposition of a sentence of death upon a governmental appeal, would be any less placed twice in jeopardy of life or limb than was the defendant in *Kepner*, who, after acquittal in the court of first instance, was found guilty and sentenced to imprisonment for slightly less than two years upon appeal by the government. * * * Therefore, the conclusion appears inescapable that to subject a defendant to the risk of substitution of a greater sentence, upon an appeal by the government, is to place him a second time "in jeopardy of life or limb."

Essentially, the court of appeals' theory is that the imposition of a sentence should be treated, for double jeopardy finality purposes, as an "implied acquittal" of a greater sentence. See Van Alstyne, *In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant*, 74 Yale L. J. 606, 634-635 (1965).

But this theory does not withstand analysis. First, the court's reliance on *Kepner* ignores *Kepner's* primary focus on the undesirability of a second *trial.* Second, the court's simple equation of the imposition of a sentence with an acquittal ignores the "particular significance" that is attached to an acquittal and the fundamental distinctions, with respect to double jeopardy policies, between a sentence and an acquittal on the issue of guilt.

1. ***Both English Common Law and American Practice Have Allowed Increase of a Sentence After it Has Been Pronounced***

When a jury returns a verdict of not guilty, the defendant is absolutely protected by the Double Jeop-

ardy Clause from any effort to overturn that verdict or to pursue the same charge in a different proceeding. From the origins of double jeopardy at common law until the present day, however, the pronouncement of sentence has never carried the same type of finality. The common law writs of *autrefois acquit* and *autrefois convict* protected defendants against retrial on the same charge, but not specifically against resentencing. See *United States* v. *Wilson*, *supra*, 420 U.S. at 340; 4 W. Blackstone, *Commentaries*, Ch. XXVI, *335-336 (Tucker ed. 1803).[7]

Of course English common law initially did not have to grapple with the specific question of the limitations on the state's power to increase a sentence, because virtually all felonies (to which double jeopardy principles were originally limited) were punishable by death or deportation. See Comment, *Statutory Implementation of Double Jeopardy Clause*, 65 Yale L.J. 339, 342-343 (1956); J. Sigler, *Double Jeopardy* 20 (1969). But as sentences of imprison-

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[7] The writ of *autrefois convict*, of course, protected a defendant against double punishment to the extent that imposition of a second sentence was precluded by the bar against a second trial. As Blackstone points out, 4 W. Blackstone, *supra*, at *336, this plea was especially useful to a defendant who sought the "benefit of clergy" in arrest of judgment. A defendant who was convicted in the Crown's courts could, once in a lifetime, by demonstrating his ability to read, exercise his privilege to be turned over to the ecclesiastical courts for punishment. The plea of *autrefois convict* protected this right by insulating the lenient sentence that was usually given by the ecclesiastical courts from further action by the Crown. See also Black's Law Dictionary 144 (5th ed. 1979); M. Friedland, *Double Jeopardy* 326-335 (1969).

ment became more common, the practice was established in the English courts of permitting the trial court to increase a sentence, without a retrial, during the same term of court in which the sentence was originally pronounced. See 1 *Archbold's Criminal Procedure* 689-690 (Waterman's 7th Am. ed. 1860). This practice was not thought to violate double jeopardy principles. Because the system gave the courts power over a judgment until the end of the term in which it was issued, the original sentence was not treated as final until the term had ended. See generally *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 166-167 (1873); *id.* at 192-194 (Clifford, J., dissenting).[8]

The Double Jeopardy Clause of the Constitution was drafted with the common law double jeopardy protections in mind. See *United States* v. *Wilson*, *supra*, 420 U.S. at 341-342; *Green* v. *United States*, 355 U.S. 184, 200-201 (1957) (Frankfurter, J., dissenting). Nothing in the history of the adoption of the Clause suggests that its purposes included protecting the finality of sentences, let alone any intent to prohibit the settled practice under which trial courts could modify or increase sentences during a single term of court. And early American cases con-

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[8] Coke described this power as follows: "[D]uring the terme wherein any judiciall act is done, the record remaineth in the brest of the judges of the court, and in their remembrance, and therefore the roll is alterable during that terme, as the judges shall direct." 2 *Coke Upon Littleton*, Lib. 3 Cap. 7, Sec. 438 [260.a.] (Day's ed. 1812).

tinued to permit this practice. See *Jobe* v. *State*, 38 Ga. 235, 236 (1859). See also *State* v. *Harrison*, 18 Tenn. (10 Yerger) 542, 546 (1837). In *Commonwealth* v. *Weymouth*, 84 Mass. 144 (1861), the court upheld the increase of a defendant's sentence from two to three and a half years' imprisonment on the day after sentence had been pronounced, noting the common law rule that sentences could be increased during the same term. Then, although there apparently was no basis for it in common law or prior American practice, the *Weymouth* court went on to remark that it might have reached a different result if execution of the sentence had already begun. *Id.* at 146-147.

The rule suggested by *Weymouth* has become the general practice in the federal courts, and it appears to this day to be well settled that the sentencing judge is permitted to recall the defendant and increase his sentence as long as he has not begun to serve the sentence. See, *e.g.*, *United States* v. *DiLorenzo*, 429 F.2d 216, 220 (2d Cir. 1970), cert. denied, 402 U.S. 950 (1971); *Williams* v. *United States*, 422 F.2d 1318 (5th Cir. 1970); *Vincent* v. *United States*, 337 F.2d 891, 894 (8th Cir. 1964), cert. denied, 380 U.S. 988 (1965); *United States* v. *Byars*, 290 F.2d 515, 516 (6th Cir.), cert. denied, 368 U.S. 905 (1961).[9] Accordingly, in contrast to

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[9] It has been contended that the other aspect of the customary federal practice, *i.e.*, that the trial judge may not in-

acquittals, the practice in this country has never protected any defendant who has had what appears to be a final sentence pronounced upon him from the unhappy fate of having that sentence later increased.

While there is little American experience with appellate review of sentences, this history demonstrates that the common law has never ascribed such finality to a sentence as would prevent a legislature from authorizing its appeal by the prosecution. Indeed, several countries that trace their legal systems to the English common law permit such appeals. See Canada: Can. Rev. Stat. §§ 605(1)(b) and 748(b)(ii) (*Martin's Annual Criminal Code* (1979)); Australia (New South Wales): Criminal Appeal Act of 1912, as amended in 1924, 3 Pub. Acts N.S.W. § 5D (1959); New Zealand: Crimes Act 1961, as amended by the Crimes Amendment Act of 1966, 1 Repr. Stat. N.Z. § 383(a) (1979). As one commentator has noted, a government "appeal from sentence has not generally been categorized as a violation of the rules against double jeopardy, which are less concerned about the extent of punishment than about the determination of guilt or innocence." M. Friedland, *Double Jeopardy* 290 (1969).

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crease a sentence once service has begun (see, *e.g.*, *Borum* v. *United States*, 409 F.2d 433 (D.C. Cir. 1967), cert. denied, 395 U.S. 916 (1969)), is required by the constitutional guarantee against multiple punishment. This contention is discussed in Part C, *infra*, pages 42-47.

2. *The Holdings of This Court Confirm that Sentences Do Not Have Finality Comparable to Acquittals for Double Jeopardy Purposes*

The decisions of this Court in the sentencing area have also established that a sentence does not have qualities of constitutional finality comparable to an acquittal. In *Bozza* v. *United States*, 330 U.S. 160 (1947), the Court held that the trial judge had the power to recall a defendant and increase his sentence when the sentence first imposed was legally erroneous because it had omitted the mandatory fine provided by statute. And in *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), the Court made clear that a defendant has no right of finality even in a valid sentence entered in compliance with the statute. *Pearce* held that a defendant who is retried following a successful appeal of a conviction may, without offense to double jeopardy principles, be sentenced on retrial to a longer sentence than had been imposed at the first trial.[10] If a special rule of finality applied to the imposition of a sentence, the original sentence imposed should have served as a ceiling on any sentence that could be imposed on retrial. Accordingly, *Pearce* indicates that the Double Jeopardy Clause does not protect any finality interest in a sentence against a statutorily authorized appeal.

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[10] The rule of *Pearce* permitting an increase of sentence on retrial is a " 'well-established part of our constitutional jurisprudence.' " *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 24 (1973).

It is true, of course, that *Pearce* did not deal with an appeal, but rather with "the imposition of wholly new sentences after wholly new trials" (395 U.S. at 722), but the Court itself noted that this consideration is only a "conceptual nicety" (*ibid.*). We submit that, if anything, the differences between the present situation and that in *Pearce* make an even stronger case for permitting appeals of sentences. In the appeal context, review is had to rectify an erroneous sentence; in *Pearce*, there is no indication that the first sentence was in any respect defective. Moreover, in this case Congress has expressly provided that dangerous special offender sentences be subject to review, so respondent could have no expectation that the sentence is final until appeal has been exhausted. In the retrial situation, by contrast, it is arguable that the defendant has an expectation of finality in the sentence imposed and that an appeal of his conviction, which does not call the sentence into question, reopens only the question of guilt or innocence, not sentence, on retrial. Cf. *Brady* v. *Maryland*, 373 U.S. 83 (1963). The Court, of course, has rejected this latter approach in *Pearce* in holding that "the slate has been wiped clean" (395 U.S. at 721) by the reversal of the first conviction.

The court of appeals perforce acknowledged that, in light of *Pearce*, a sentence may be subject to later increase without violating the Double Jeopardy Clause. However, the court sought to limit *Pearce* to its particular factual context of a retrial after a

conviction has been set aside on the defendant's appeal. Specifically, the court of appeals asserted that the defendant in *Pearce* was subject to a higher sentence on retrial only because of his "voluntary choice" to appeal his conviction. In a case like the instant one, the court reasoned, where the defendant takes no affirmative action,[11] the Double Jeopardy Clause bars the increase of a sentence on appeal (Pet. App. 36a-38a).[12]

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[11] Under the theory of the court of appeals, such affirmative action is not restricted to taking an appeal, but would also apparently include contesting at the district court level the determination that the defendant is a dangerous special offender (Pet. App. 26a n.17). We are hard pressed to understand why the government could take an appeal challenging the failure to classify a defendant as a dangerous special offender (which appeal, if successful, would result in an increased sentence on remand) but cannot appeal claiming abuse of discretion or other error in the selection of a sentence for one properly classified as a dangerous special offender.

[12] Several state statutes permit an increase of sentence by an appellate court if the defendant appeals the sentence. See Pet. App. 24a n.15; Dunsky, *The Constitutionality of Increasing Sentences on Appellate Review*, 69 J. Crim. L. & Criminology 19, 20 n.8 (1978). Although it is arguable that the threat of an increase in sentence upon a defendant's appeal violates a due process consideration identified in *Pearce*, see 395 U.S. at 723-726, by exerting a chilling effect on the defendant's decision whether to appeal, the constitutionality of this procedure has been upheld by lower courts. See *Robinson* v. *Warden*, 455 F.2d 1272 (4th Cir. 1972); *Walsh* v. *Picard*, 446 F.2d 1209 (1st Cir. 1971); *Hicks* v. *Commonwealth*, 345 Mass. 89, 185 N.E.2d 739 (1962), cert. denied, 374 U.S. 839 (1963); *Kohlfuss* v. *Warden of Connecticut State Prison*, 149 Conn. 692, 183 A.2d 626, cert. denied, 371

The distinction of *Pearce* suggested by the court of appeals is quite unsatisfactory, and its rationale has in any event been rejected by this Court. Essentially, the court of appeals found that a defendant has an absolute constitutional right that the sentence originally imposed upon him not be increased, but that the right is lost if the defendant appeals his conviction on the ground that error was committed at trial. The unfairness of such a rule was well expressed by Justice Holmes: "it cannot be imagined that the law would deny to a prisoner the correction

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U.S. 928 (1962). And post-*Pearce* decisions of this Court indicate that such a procedure does not violate due process because there is no danger of vindictiveness. See *Chaffin* v. *Stynchcombe*, 412 U.S. 17 (1973); *Colten* v. *Kentucky*, 407 U.S. 104 (1972). See also Dunsky, *supra*, at 37-38. The court of appeals suggested that it might find such a statute to be constitutional but stated that these decisions were completely irrelevant to the question of an appeal instigated by the prosecution (Pet. App. 38a n.25).

18 U.S.C. 3576 does not implicate due process vindictiveness concerns. It specifically provides that "a sentence may be made more severe only on review of the sentence taken by the United States." And the time for the United States to take an appeal expires prior to the time for a defendant to take an appeal. Accordingly, the statutory scheme guards against the danger that a defendant's sentence will be increased in retaliation for the exercise of his right to appeal. See S. Rep. No. 91-617, 91st Cong., 1st Sess. 94, 166-167 (1969). One commentator who strongly criticized on due process grounds the practice of increasing sentences upon retrial, a criticism adopted by the Court in *Pearce*, saw no constitutional objection to appeal of a sentence by the prosecution. See Van Alstyne, *In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant*, 74 Yale L. J. 606, 613, 620-621 (1965).

of a fatal error, unless he should waive other rights so important as to be saved by an express clause in the Constitution of the United States." *Kepner* v. *United States, supra,* 195 U.S. at 135 (Holmes, J., dissenting).

The court of appeals acknowledged that this Court, in *Green* v. *United States, supra,* had accepted Justice Holmes' position and rejected the notion that a defendant could "waive" his constitutional rights by appealing his conviction; but the court stated that *Pearce* involved not a "waiver," but an exercise of the defendant's "voluntary choice" as discussed in *United States* v. *Scott, supra* (Pet. App. 37a-38a). This contention completely misunderstands the Court's position in *Green* as well as its rationale in *Scott.* The Court stated in *Green* that "[w]hen a man has been convicted * * * it is wholly fictional to say that he 'chooses' to forego his constitutional defense of former jeopardy * * * in order to secure a reversal of an erroneous conviction * * *. In short, he has no meaningful choice." 355 U.S. at 191-192. The same is true, of course, in the sentencing context of *Pearce.* A defendant's challenge to the validity of his indictment or the fairness of his trial certainly does not signal a willingness to place the length of his sentence in issue.[13] In *Pearce,* as in *Green,* the de-

[13] Indeed, even when the defendant takes a voluntary action that appears to signal a waiver of a double jeopardy claim, such as moving for a new trial, the Court has been reluctant to find such a waiver. See *Burks* v. *United States,* 437 U.S. 1, 17-18 (1978). See also *Menna* v. *New York,* 423 U.S. 61 (1975).

fendant had no meaningful choice whether to appeal, and he cannot be considered to have waived any right to limit his punishment to his original sentence. See also *Ludwig* v. *Massachusetts*, 427 U.S. 618 (1976) (harsher sentence may be imposed at second tier of criminal system even though defendant must seek trial at second tier in order to obtain trial by jury). Rather, *Pearce* permits a sentence increase precisely because the defendant has no constitutional right to retain his original sentence once the "slate has been wiped clean." *North Carolina* v. *Pearce*, *supra*, 395 U.S. at 721. The "slate is wiped clean" when the sentence is lawfully set aside pursuant to an established procedure, whether by a reversal of the conviction on appeal as in *Pearce* or by an appeal of sentence pursuant to a statute as in this case.[14]

3. *The Double Jeopardy Policies That Bar Reprosecution After An Acquittal Do Not Support Prohibition Of Sentence Appeals*

The classic description of the reasons for the bar against successive prosecutions was set forth in *Green* v. *United States*, *supra*, 355 U.S. at 187-188:

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[14] The court of appeals' reliance on *United States* v. *Scott*, *supra*, is misplaced. In *Scott*, the defendant did indeed exercise a voluntary choice, making a strategic decision to terminate the trial before its completion. The defendant could have chosen to make his motion after the completion of the trial, thus avoiding the necessity for a retrial. Accordingly, the Court held that the defendant was in no position to complain about a double jeopardy problem that he could have avoided. 437 U.S. at 98-101. In *Pearce*, of course, the defendant could not have avoided the need for a retrial except by foregoing his right to have an invalid conviction set aside.

> The underlying idea * * * is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

The appeal of a sentence by the prosecution does not sufficiently implicate these considerations to justify equating it with a successive prosecution, because the appeal does not involve a retrial or anything approaching the ordeal of a trial. Under Section 3576, an appeal is taken on the record made in the sentencing court, and the appellate court makes a determination whether the sentence originally pronounced should be accepted or modified. Because the defendant is aware of the appeal provision, he has no expectation of finality in the sentence until the appeal is exhausted. At most, appeal prolongs the period of anxiety over what his final sentence is to be, but only for a finite time period as provided by statute. In this regard, appeal of a sentence is no more of an "ordeal" than any government appeal under 18 U.S.C. 3731 of a trial court determination that, if undisturbed, would resolve the case in the defendant's favor. See *United States* v. *Wilson*, *supra*. Indeed, the anxiety of the defendant is usually less in the sentencing context, because he already knows the

result of the fundamental inquiry into whether he is innocent or guilty.

Although the government's appeal in this case rests on the findings of the district court and does not request a second sentencing hearing, it is apparent that even such a second proceeding would not implicate the concerns of the Double Jeopardy Clause in the manner that a retrial does. At a sentencing hearing, the defendant does not endure any anxiety over whether he will be stigmatized by a conviction, and he certainly is subject to no risk of being convicted although innocent. Moreover, the sentencing proceedings are brief and informal; while the outcome is no doubt important to the defendant, he does not typically undergo anything comparable to the expense, embarrassment and ordeal associated with a trial. Finally, the sentence determination itself is quite different from an acquittal at trial. An acquittal represents a factual determination by the fact-finder, ordinarily the jury, that the defendant is not guilty. It has been defined by the Court as " 'a resolution, correct or not, of some or all of the factual elements of the offense charged.' " *United States* v. *Martin Linen Supply Co.*, *supra*, 430 U.S. at 571. See also *United States* v. *Scott*, *supra*, 437 U.S. at 82; *Sanabria* v. *United States*, *supra*, 437 U.S. at 71. A sentence is characteristically determined primarily on the basis of information developed outside the courtroom, such as presentence reports. It is purely

a judicial determination, and much that goes into it is the result of inquiries that are essential informal and non-adversarial in nature.

This Court has recognized these important differences between sentences and acquittals, and its decisions have consistently refused to equate the two for double jeopardy purposes. This distinction is most evident in a comparison of the cases dealing with the scope of retrial and resentencing after a conviction has been reversed. In *Stroud* v. *United States*, 251 U.S. 15 (1919), the Court held that a defendant's sentence at one trial did not act as a ceiling on the sentence that could be imposed at a retrial. The defendant was tried and convicted three times of first degree murder, the first two convictions having been reversed on appeal. At the first trial he was sentenced to death, but at the second trial, upon a recommendation by the jury, he was sentenced to life imprisonment. The Court ruled that his death sentence at the third trial did not violate the Double Jeopardy Clause.

In *Green* v. *United States*, *supra*, a defendant was convicted of second degree murder, although the jury could have convicted him of first degree murder. After his conviction was reversed on his appeal, he was retried and convicted of first degree murder. The Court held that this conviction violated the Double Jeopardy Clause on the theory that the jury's verdict at the first trial was an "implicit acquittal"

of first degree murder. 355 U.S. at 190-191. The dissent argued that the effect of the second conviction, at a retrial that was clearly permissible, was no different from the situation where the defendant's sentence was increased at retrial, which was permissible under *Stroud*. 355 U.S. at 213 (Frankfurter, J., dissenting). The Court, however, rejected this argument and explicitly distinguished *Stroud* on the ground that the defendant there had been convicted of the same offense in both trials. 355 U.S. at 195 n.15.

Any uncertainty over the effect of *Green* on sentencing was laid to rest by *North Carolina* v. *Pearce*, *supra*, where the Court explicitly held that the Double Jeopardy Clause does not bar the imposition of a sentence on retrial higher than that imposed at an earlier trial, as long as credit is given for time already served.[15] Once a retrial is permissible, the Court reasoned, double jeopardy does not prohibit the imposition of any sentence that can otherwise lawfully be imposed. 395 U.S. at 721. The position that the increased sentence in *Pearce* was indistinguishable from the conviction of a higher degree of-

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[15] After *Green*, there had been some confusion in state courts over whether the implicit acquittal theory of *Green* should be extended to the increase of a sentence. Compare *Hicks* v. *Commonwealth*, *supra*, and *Kohlfuss* v. *Warden of Connecticut State Prison*, *supra* (increase of sentence does not violate double jeopardy), with *People* v. *Henderson*, 35 Cal. Rptr. 77, 386 P.2d 677, 685-686 (1963) (rationale of *Stroud* vitiated by *Green*).

fense in *Green*, on the theory that a particular sentence is an implicit acquittal of a higher sentence, was clearly presented to and rejected by the Court. See 395 U.S. at 727-728 (Douglas, J., concurring); *id.* at 746 (Harlan, J., concurring in part and dissenting in part). Recognizing the fundamental distinction between a sentence and an acquittal, the Court held that *Green* was not applicable because it "was based upon the double jeopardy provision's guarantee against retrial for an offense of which the defendant was *acquitted.*" 395 U.S. at 720 n.16 (emphasis in original).

The Court has also recognized a significant difference between a sentence and an acquittal in another context. In *Bozza* v. *United States*, *supra*, the district court had originally sentenced the defendant to imprisonment but omitted the mandatory fine provided by statute. This sentence was not treated as final for double jeopardy purposes, and the court's subsequent resentencing of the defendant to the same term of imprisonment and the mandatory fine was upheld. This Court explained that no double jeopardy problem was presented by the increased sentence because the trial court had no authority to impose the original sentence in the form it did. 330 U.S. at 167. See also Fed. R. Crim. P. 35.

When the Court was presented with an analogous situation in the context of an acquittal, however, it reached precisely the opposite result. In *Fong Foo* v. *United States*, 369 U.S. 141 (1962), the trial judge

directed the jury to return a verdict of acquittal after the prosecution had barely begun to present its case. The court of appeals concluded that the trial judge had no power to direct the judgment in question, and this Court did not dispute that conclusion. See 369 U.S. at 143. See also *United States* v. *Scott, supra*, 437 U.S. at 90; *Sanabria* v. *United States, supra*, 437 U.S. at 64, 78; *United States* v. *Martin Linen Supply Co., supra*, 430 U.S. at 571. Nonetheless, because a final judgment of acquittal had been entered, the Court concluded that retrial of the defendant would violate the Double Jeopardy Clause. The acquittal in *Fong Foo* was entitled to a greater degree of finality than the sentence in *Bozza* because of the strong policy against multiple trials, which is implicated in the acquittal, but not the sentencing, context. See *United States* v. *Wilson, supra*, 420 U.S. at 347-348.

The recognition that acquittals require a greater degree of finality than do sentences is highlighted by examination of the different types of sentences that exist in our criminal justice system. It is clear that the Double Jeopardy Clause does not give the defendant the right to know at any specific time what his exact punishment is to be. There are many types of criminal sanctions established by Congress under which the defendant is unaware of the exact extent of his punishment for significant periods of time, or even for life, that are not considered to be in violation of the Double Jeopardy Clause.

Under 18 U.S.C. 3561, a defendant may be placed on probation instead of being imprisoned. He is subject, however, to revocation of his probation and imposition of imprisonment, obviously an increase in the severity of his sentence; yet the Double Jeopardy Clause does not protect him against this increase. See, *e.g.*, *Thomas* v. *United States*, 327 F.2d 795 (10th Cir.), cert. denied, 377 U.S. 1000 (1964). In fact, if the defendant is placed on probation after trial, and imposition of sentence is suspended, he may be sentenced to any sentence that could originally have been imposed if his probation is revoked.[16] For example, if a defendant is originally subject to a 10-year term of imprisonment and is put on probation for five years with imposition of sentence suspended, he may be sentenced to a full 10-year imprisonment term if he violates his probation one week before it expires. See, *e.g.*, *Dunn* v. *United States*, 561 F.2d 259 (D.C. Cir. 1977). Also, the sentences of certain drug offenders are composed partly of special parole terms under 21 U.S.C. 841. If parole is violated, the offender may be imprisoned consistent with the Double Jeopardy Clause. *United States* v. *Kuck*, 573 F.2d 25 (10th Cir. 1978). Thus these drug offenders must endure significant periods in which they are uncertain whether they will go to

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[16] It is clear that this sentence constitutes punishment for the original offense and not for the conduct that violated the conditions of probation.

prison for an offense of which they were convicted a long time ago; in fact, because the length of special parole terms is not limited by the statute, a defendant may be subject to this uncertainty for life. See *United States* v. *Walden*, 578 F.2d 966, 972 (3d Cir. 1978); *United States* v. *Jones*, 540 F.2d 465, 468-469 (10th Cir. 1976), cert. denied, 429 U.S. 1101 (1977).[17]

These other criminal sanctions, of course, do not involve the increase of a final sentence. When these conditional sentences are first imposed, the defendant is aware that an imprisonment term may later be imposed. But the situation here is no different. It is Congress that determines the finality of a sentence, and, Congress having spoken, the defendant here is similarly aware that a dangerous special offender sentence is subject to increase on appeal. The defendant's legitimate expectations are not defeated if his sentence is increased on appeal any more than if his parole or probation is revoked.

In sum, the common law tradition and this Court's decisions in *North Carolina* v. *Pearce*, *supra*, and *Bozza* v. *United States*, *supra*, indicate that the Double Jeopardy Clause does not require that a sentence be given a degree of finality that would prevent the sentence from later being increased. And it is apparent, because of the critical differences between a sentence and an acquittal and because of

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[17] Other examples of effective sentence increases are forfeiture of good time credits, 18 U.S.C. 4165, and revocation of parole, 18 U.S.C. 4214.

the primary focus of the double jeopardy protection on discouraging retrials, that *Kepner* and other cases dealing with acquittals do not suggest a contrary result.

C. Increase of A Sentence On Appeal Is Not An Unconstitutional Multiple Punishment

The court of appeals found (Pet. App. 33a) that increase of a sentence on appeal under 18 U.S.C. 3576 constitutes "multiple punishment" in violation of the Double Jeopardy Clause. Because the statute clearly is designed to have the court of appeals consider what is the appropriate single sentence for the offense, it is difficult to understand how 18 U.S.C. 3576 can reasonably be characterized as authorizing the imposition of a double punishment or two distinct sentences for a single offense. The court's strange conclusion is a result of extending to the case of an appeal this Court's dictum in *United States* v. *Benz*, 282 U.S. 304, 307 (1931), which states that the federal practice of barring an increase in sentence by the trial court after service of the sentence has commenced is required by the constitutional bar against double punishment. There is no sound basis for that dictum, however, and it is unjustified to give it any effect today, much less extend its application to statutorily authorized appeals as the court of appeals did here.

The issue in *Benz* was whether the trial judge had the power to *reduce* a defendant's sentence after service of the sentence had begun, and the Court

found that it did have such power. The Court went on, however, to state in dictum that the trial judge could not increase the sentence after service had begun without imposing double punishment in violation of the Double Jeopardy Clause. 282 U.S. at 307. On its face, *Benz* suggests a peculiar constitutional rule. It is not apparent why the defendant's sentence should be subject to increase by the trial judge, after it has been to all appearances finally imposed, so long as he has not begun to serve it, yet the Constitution should intervene to prohibit such increase when the defendant begins service of his sentence. The implication of the rule on the facts of this case is that, although respondent's 10-year concurrent sentence may not be increased, respondent's sentence would have been subject to increase if the district court had given him the functional equivalent—a one-year sentence to be served consecutive to his other sentences. *Benz* itself suggests no justification for this rule; rather, it is presented as settled law. Thus, to understand the *Benz* dictum, it is necessary to examine its source, *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873).

In *Lange*, the trial court had erroneously imposed a sentence of one year's imprisonment *and* a fine when the maximum authorized sentence was one year's imprisonment *or* a fine. After Lange had paid the fine and served five days of his sentence, the court became apprised of its mistake and resentenced him to one year's imprisonment from that date. 85 U.S. (18 Wall.) at 164, 175. This Court held that

once Lange had paid the fine (which, having been paid into the Treasury, could not be refunded) and thus "had fully suffered one of the alternative punishments to which alone the law subjected him, the power of the court to punish further was gone." *Id.* at 176. The trial court's attempt to resentence him imposed a second sentence upon him after the service of one sentence, the fine, had been completed.

The Court was also troubled by the fact that the trial court gave no credit for time served on the original sentence, which meant that Lange would have to serve what amounted to two terms, one of one year and one of five days, the total exceeding that authorized by the statute. Noting that the defendant had already served five days of his sentence, the Court asked: "can the court vacate that judgment entirely, and without reference to what has been done under it, impose another punishment on the prisoner on that same verdict? To do so is to punish him *twice* for the same offence." 85 U.S. at 175 (emphasis in original). This specific language was quoted in *Benz* in support of its dictum. 282 U.S. at 309. But it is apparent that the circumstance that suggested to the Court in *Ex parte Lange* that a sentence increase after commencement of service would constitute double punishment in that case is not susceptible of general application. Clearly, a court has the power to give credit for time already served on a charge; indeed, when sentencing a defendant on retrial, the Constitution requires that such credit be given. *North Carolina* v. *Pearce*, *supra*, 395 U.S. at 717-719. Yet

Benz suggests no other basis for its constitutional dictum. Thus it seems clear that as long as credit is given for time already served, there is no basis for ascribing any constitutional significance to the commencement of service of sentence in establishing the sentence's finality. To the extent that increase of a sentence can arguably be said to implicate multiple punishment concerns at all, it is only in the specific context that existed in *Lange*, where the defendant has fully completed service of his sentence or where the increased sentence exceeds the statutory maximum.

In sum, we can perceive no basis for the dictum in *Benz* that the Constitution guarantees the finality of a defendant's sentence from the time service commences. In addition, however, it is apparent that the court of appeals' decision extends that dictum to a situation not contemplated by the *Benz* Court. In the absence of any legitimate authorization to the contrary, when a defendant begins to serve his sentence, he likely perceives the amount of that sentence as finally determined. Thus there is at least a logical policy rationale, even if it is not a constitutional requirement, for prohibiting the trial judge from thereafter increasing the sentence. Here, however, Congress has specifically provided that the sentence initially imposed upon a dangerous special offender is subject to appeal. Thus the defendant has no expectation of finality in the original sentence. It is certainly open to question whether the *Benz* Court would have viewed such a congressional decision to be barred by the Double Jeopardy Clause. See Dunsky, *The Constitutionality of Increasing Sentences*

on Appellate Review, 69 J. Crim. L. & Criminology 19, 32 (1978); S. Rep. No. 91-617, *supra*, at 97.[18] Indeed, although the Supreme Court has never been faced with the issue, during the brief time the appellate courts in this country were empowered to impose sentence it was apparently understood that they were empowered to increase a sentence of the district court that was deemed too lenient. See *Bates* v. *United States*, 10 F. 92, 96 (C.C.N.D. Ill. 1881).[19]

The multiple punishment guarantee that has evolved in the holdings of this Court, apart from the *Benz* dictum, clearly is not involved in this case. That guarantee concerns the amount of punishment that lawfully can be imposed on a defendant. As in *Ex Parte Lange*, a defendant may not receive a higher sentence than that authorized by the legislature. Application of this guarantee in a given case can be determined only by reference to the punishment authorized by the legislature. *Whalen* v. *United States*,

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[18] Similarly, the other dicta cited by the court of appeals, in *Murphy* v. *Massachusetts*, 177 U.S. 155 (1900), a case upholding imposition of a longer sentence when the first was vacated, and *Reid* v. *Covert*, 354 U.S. 1, 37 n.68 (1957), a case that did not involve the Double Jeopardy Clause, were expressed in cases where the Court clearly was not considering the situation of statutorily authorized sentence appeal.

[19] Under the Act of March 3, 1879, ch. 176, Section 3, 20 Stat. 354, the federal circuit courts were given the power "in case of an affirmance of the judgment of the district court to pronounce final sentence and to award execution thereon." That Act was supplanted by the Act of March 3, 1891, ch. 517, 26 Stat. 826. See *United States* v. *Rosenberg*, 195 F. 2d 583, 604 n.25 (2d Cir. 1952), cert. denied, 344 U.S. 838 (1952); 41 U. Cin. L. Rev. 195, 196-197 (1972).

No. 78-5471 (April 16, 1980), slip op. 3-4. See also *id.* at 2 (Blackmun, J., concurring); *Brown* v. *Ohio*, 432 U.S. 161, 165 (1977). Clearly, no double jeopardy problem would have been presented in *Ex Parte Lange* if Congress had established that the offense was punishable by fine *and* imprisonment, even though those are multiple punishments. See *Whalen* v. *United States, supra*, slip op. 4.[20] There is no question what punishment was authorized by Congress under 18 U.S.C. 3575 and 18 U.S.C. 3576, or that Congress had the power to establish that punishment. Accordingly, 18 U.S.C. 3576 does not violate the guarantee against multiple punishment that is enunciated in *Ex parte Lange.*

D. The Double Jeopardy Clause Does Not Prohibit A Procedure That Permits Entry Of A Tentative Sentence By One Body With The Authority To Impose A Final Sentence Residing In A Second Body

1. *This Court has Recognized that the Legislature May Establish a Two-Stage Procedure for Reaching a Final Determination in a Criminal Case*

The scheme of review set up under 18 U.S.C. 3576 essentially establishes a two-stage sentencing procedure; a tentative sentence is entered by the district

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[20] Indeed, it is not entirely clear why the Court in *Ex parte Lange* rested its decision on double jeopardy grounds, since the same result was compelled by the statute under which the defendant was convicted, wholly without regard to the existence of the constitutional double jeopardy protection. Moreover, it would appear that the Due Process Clause would preclude the imposition of a sentence depriving a defendant of either liberty or property in a manner or to an extent not authorized by statute. Cf. *Whalen* v. *United States, supra*, slip op. 5 n.4.

court that becomes final either upon action by the court of appeals if one party decides to appeal or upon expiration of the time for appeal.[21] Two-stage criminal proceedings are not uncommon, and this Court has upheld a state procedure that requires a defendant to go through two hearings in order to obtain a jury trial. *Ludwig* v. *Massachusetts, supra.* See also *Colten* v. *Kentucky,* 407 U.S. 104 (1972). Indeed, this Court has recently ruled that a two-stage trial and sentencing scheme somewhat analogous to 18 U.S.C. 3576 does not violate the Double Jeopardy Clause.

In *Swisher* v. *Brady,* 438 U.S. 204 (1978), the Court considered a Maryland system that empowers a master to hear juvenile cases. The master submits proposed findings of fact, conclusions of law and recommendations to the juvenile court judge, who may adopt them without further proceedings or may modify or reject them. Either the juvenile or the

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[21] Is is clear that Congress contemplated that a sentence under 18 U.S.C. 3575 not be treated as final until the right to appeal has been exhausted. The original bill introduced in the Senate specified that the sentence shall not "be considered final until after the final disposition of any such review taken with respect to such sentence or until the expiration of the period during which any such review may be taken." S.30, 91st Cong., 1st Sess., § 3577 (1969). *Measures Relating to Organized Crime: Hearings on S.30 Before the Subcomm. on Criminal Laws and Procedures of the S. Comm. on the Judiciary,* 91st Cong., 1st Sess. 28-29 (1969). Congress, however, was advised that this language was unnecessary to preserve the statute's constitutionality, and it was omitted from the statute. See *id.* at 196 n.18; S. Rep. No. 91-617, *supra,* at 98. See also 65 Cornell L. Rev. 715, 730 (1980).

state may file exceptions to the master's findings, however, in which case the judge holds a hearing on the record that was developed before the master.[22] No new evidence may be introduced except with the consent of both parties. This Court rejected the argument that the Double Jeopardy Clause is violated under this scheme by the possibility of sentence increase or conviction following the filing of exceptions by the government. The Court held that the Maryland procedure did not require the accused to stand trial a second time; rather, under the Maryland system "an accused juvenile is subjected to a single proceeding which begins with a master's hearing and culminates with an adjudication by a judge." 438 U.S. at 215.

Like the Maryland system, 18 U.S.C. 3576 does not subject a defendant to a second trial. The "hearing" held on appeal is on the record of the sentencing court, and the government has no "second crack" at producing evidence. See 438 U.S. at 216; *Burks* v. *United States*, 437 U.S. 1, 11 (1978). The statute simply sets up a two-stage proceeding in which a final sentence is not imposed until appellate review has been completed. One difference between the schemes is that under 18 U.S.C. 3576 the first stage of the proceeding involves district courts rather than masters. But this difference is of no consequence. District courts have the power to enter some final

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[22] The juvenile may elect a trial de novo if he files exceptions. The government, however, may request only a hearing on the record.

orders, but they do not have the power to impose final dangerous special offender sentences except subject to appeal. Because the defendant is on notice from the outset that his sentence is subject to appellate review, the review procedure causes none of the emotional distress that the Double Jeopardy Clause guards against, such as is often associated with a second trial following a mistrial. See, *e.g.*, *Crist* v. *Bretz*, 437 U.S. 28, 38 (1978).

A significant difference between the two schemes is that the Maryland procedure empowers the judge to make his own independent findings, while review under 18 U.S.C. 3576 is much more limited in scope. The court of appeals may increase the sentence only if the district court abused its discretion, employed unlawful procedures or made clearly erroneous findings. Thus the court of appeals is simply empowered to correct a legal error made by the district court. Although the error may not be as egregious as that in *Bozza* v. *United States*, *supra*, what the Court said there is equally applicable here: "The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner." 330 U.S. at 166-167. The Constitution similarly does not require that a wrong move by the judge result in an unduly lenient sentence. Under the procedure involved in *Swisher*, the judge need not find legal error on the part of the master; he is free to make a de novo determination of factual matters relating to guilt or innocence based upon the

record. Surely, if this method of determining guilt or innocence is consistent with double jeopardy, the limited appellate review of sentence authorized by 18 U.S.C. 3576 is constitutional.

The conclusion that the Double Jeopardy Clause does not bar a statutorily authorized sentence appeal is highlighted by examining an analogous situation. It is clear that there is no constitutional bar to the portion of 18 U.S.C. 3576 providing for a reduction of sentence upon appeal by the defendant. If the court of appeals reduced a sentence on such an appeal on the ground that the district court had committed error in imposing its sentence, it could not be seriously contended that the Double Jeopardy Clause would bar review and reversal by this Court of the decision of the court of appeals reducing the sentence. Any such contention is foreclosed by this Court's decision in *Forman* v. *United States*, 361 U.S. 416, 426 (1960), where the Court stated that a petition for a writ of certiorari clearly could be taken from a decision by the court of appeals reversing a conviction and directing the entry of a judgment of acquittal.

The only difference between this case and the hypothetical appeal described above is that the sentence from which the government seeks to appeal is imposed by the court of appeals in one case and by the district court in the other case. At first blush, this distinction may seem to be of some significance, but that is only because it is commonly recognized that

a decision by the court of appeals is subject to review by this Court, whereas a sentence imposed by a district court is ordinarily final. But these perceptions of finality are derived solely from the structure created by Congress. Clearly, where Congress has provided that an appeal may be taken by the government from a district court sentence, that sentence is entitled to no greater finality than an appellate decision reducing a sentence at the defendant's behest. See *United States* v. *Wilson*, *supra*, 420 U.S. at 345.

2. *The Holding of the Court of Appeals Unjustifiably Elevates Form Over Substance*

The Court has often cautioned in the double jeopardy area that it is the substance of particular actions that is controlling, not the label given to those actions. See *United States* v. *Martin Linen Supply Co.*, *supra*, 430 U.S. at 571; *United States* v. *Wilson*, *supra*, 420 U.S. at 336. Yet the decision of the court of appeals here exalts form over substance.

It is apparent that Congress could have achieved the purposes of 18 U.S.C. 3576 by passing a slightly different statute whose constitutionality could not be doubted. Congress could have provided that any defendant found to be a dangerous special offender be sentenced to a mandatory term of 25 years' imprisonment, but permitting the district court to recommend a reduced sentence to the court of appeals, which could accept the recommendation or reject it. Such a scheme would offer no conceivable foothold for a double jeopardy objection. This alternative scheme

might differ in its administrative effects from the existing statute (see Pet. App. 28a n.19), but surely the impact on the defendant, who is the person the Double Jeopardy Clause seeks to protect, is no different under this procedure than under Section 3576 as it presently stands. No double jeopardy policy is advanced by approving one of these procedures, yet declaring the other to be unconstitutional.

This point is illustrated even more forcefully by examining the sentence appeal provision contained in the proposed federal criminal code revision that was reported by the Senate Judiciary Committee in January 1980.[23] Under this statute, if the district court's

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[23] The provisions of Section 3725 of S. 1722 that pertain to government sentence appeals provide as follows.

> (b) Appeal by the Government—The government may, with the personal approval of the Attorney General or the Solicitor General, file a notice of appeal in the district court for review of an otherwise final sentence imposed for a felony or a Class A misdemeanor if the sentence includes a lesser fine or term of imprisonment or term of supervised release than the minimum established in the guidelines, or includes a less limiting condition of probation or supervised release under section 2103(b)(6) or (b)(11) than the minimum established in the guidelines, that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1), and that are found by the sentencing court to be applicable to the case, unless—
>
> > (1) the sentence is equal to or greater than the sentence recommended or not opposed by the attorney for the government pursuant to a plea agreement under Rule 11(e)(1)(B) of the Federal Rules of Criminal Procedure; or

sentence is lower than the minimum established in guidelines to be issued by the Sentencing Commis-

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(2) the sentence is that provided in an accepted plea agreement pursuant to Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure.

* * * * *

(d) Consideration.—Upon review of the record, the court of appeals shall determine whether the sentence imposed is unreasonable, having regard for—

(1) the factors to be considered in imposing a sentence, as set forth in part III of this title; and

(2) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 2003(c).

(e) Decision and Disposition.—If the court of appeals determines that the sentence is—

(1) unreasonable, it shall state specific reasons for its conclusions and—

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), shall set aside the sentence and—

(i) remand the case for imposition of a lesser sentence;

(ii) remand the case for further sentencing proceedings; or

(iii) impose a lesser sentence;

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), shall set aside the sentence and—

(i) remand the case for imposition of a greater sentence;

(ii) remand the case for further sentencing proceedings; or

(iii) impose a greater sentence; or

(2) not unreasonable, it shall affirm the sentence.

sion, the government may appeal the sentence. The court of appeals may then increase the sentence if it finds the sentence unreasonable. The defendant has similar rights of appeal with respect to sentences that exceed the guidelines.

The decision of the court of appeals was carefully restricted to the specific terms of 18 U.S.C. 3576 (Pet. App. 28a n.19),[24] and thus its holding does not encompass this bill, under which the government's appeal rights are more limited than under 18 U.S.C. 3576. However, the broad reasoning employed by the court of appeals would seem applicable to any statute permitting a government appeal and thus would cast substantial doubt on the validity of the Senate bill. Nonetheless, certain formalistic changes could be made to this bill that would obviate any double jeopardy objection but have no effect whatsoever on the substance.

Clearly, Congress could make the sentencing guidelines partially mandatory, giving the sentencing court no power to impose a sentence lower than the minimum. If a court nevertheless imposed a sentence below the minimum, that sentence could be increased at a later time on the settled authority of *Bozza* v.

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[24] The court of appeals rejected the government's contention that the district court's dangerous special offender sentence was "tentative," concluding that the district court sentence under the statute was effective immediately. In that connection, the court specifically refrained from expressing an opinion on any alternative formulations of 18 U.S.C. 3576 that Congress could have enacted (Pet. App. 27a-28a & n.19).

United States, supra. A mandatory sentencing scheme, however, would give up some of the critical features of the flexible scheme contained in the bill. But Congress could change the mandatory scheme slightly to eliminate the difference. The statute could provide that, even though the district court has no power to impose a final sentence below the guideline minimum, the court may recommend such a sentence to be imposed by the court of appeals if it thinks it appropriate and gives its reasons. This scheme satisfies any conceivable double jeopardy objection, yet it is not different in substance from the sentencing scheme contained in the Senate bill. No rational constitutional theory would elevate form over substance to a degree that would distinguish between the provisions of the Senate bill and the alternative scheme outlined above. The conclusion is inescapable that nothing in the Double Jeopardy Clause prohibits Congress from authorizing the government to appeal sentences.

E. Substantial Considerations Of Public Policy Support The Congressional Judgment That Appellate Review Of Certain Kinds Of Sentences At The Behest Of The Prosecution Will Improve The Administration Of Criminal Justice

The general purpose of the Double Jeopardy Clause is to protect defendants against "Government oppression." *United States* v. *Scott, supra,* 437 U.S. at 99. The focus of that protection is "principally as a restraint on courts and prosecutors," rather than the legislature. *Brown* v. *Ohio, supra,* 432 U.S. at 165.

This Court has never in the past invalidated an Act of Congress on double jeopardy grounds, and, in light of the sensible and beneficial purposes of government appeals of sentences, this case is a particularly inappropriate one for the Court to venture onto new constitutional ground.

Section 3576 represents a considered legislative attempt to attack a specific problem in our criminal justice system. A thorough study prior to the enactment of the statute concluded that "[t]here must be some kind of supervision over those trial judges who * * * tend to mete out light sentences in cases involving organized crime management personnel." Report of the President's Commission on Law Enforcement and the Administration of Justice: *The Challenge of Crime in a Free Society* 203 (1967). 18 U.S.C. 3576 was Congress' response to this plea. See generally S. Rep. No. 91-617, *supra*, at 85-87. The statute is limited in its scope and narrowly focused on the problem identified. It cannot reasonably be characterized as an example of "government oppression."

More generally, the decision of the court of appeals will seriously interfere with efforts to improve our criminal justice system. It has often been observed that sentencing is one of the areas of that system most in need of reform. See generally P. O'Donnell, M. Churgin, D. Curtis, *Toward a Just and Effective Sentencing System* (1977); M. Frankel, *Criminal Sentences: Law Without Order* (1973). Perhaps the most serious defect in the present system is "the

unbridled power of the sentencers to be arbitrary and discriminatory" (Frankel, *supra*, at 49), which results in extreme and irrational disparities in sentences given to similarly situated offenders. *Id.* at 7. These disparities encompass both sentences that are too lenient and ones that are too severe. The unfortunate result is that individual sentences are often unfair, and the sentencing structure as a whole is perceived as unfair.

While other techniques might be employed, appellate review of sentences is one obvious means of tackling this problem. See generally A.B.A. Project on Minimum Standards for Criminal Justice, *Standards Relating to Appellate Review of Sentences* (Approved Draft 1968); National Commission on Reform of Federal Criminal Laws, *Final Report* 317 (1971). In the absence of appeal, and so long as the sentencing power continues to reside in the first instance in the trial judge, "[t]he sentencing powers of the judges are * * * so far unconfined that, except for frequently monstrous maximum limits, they are effectively subject to no law at all." Frankel, *supra*, at 8; see also *id.* at 75-85. Appellate review of sentence creates a check upon this unlimited power of one man and necessarily leads to a greater degree of consistency in sentencing.

Appellate sentence review that does not permit an increase in sentence on appeal, however, will introduce an imbalance into the system. Instead of acting to bring all erroneous sentences to an appropriate level, the system will operate only to bring

excessive sentences to an appropriate level, while allowing sentences that are too lenient to remain undisturbed. Such an imbalance would undermine and distort the effort to reduce sentence disparities. It cannot simply be dismissed as an additional advantage given to the defendant that does not seriously interfere with the structure of the sentencing system; the disparity among sentences given to similar offenders is disruptive in itself, apart from whether the sentences are excessive, and "[a]n excessively short sentence is as disruptive as an excessively long one." *Walsh* v. *Picard*, 446 F.2d 1209, 1212 (1st Cir. 1971). See generally S. Rep. No. 96-553, 96th Cong., 2d Sess. 1136-1137 (1980).

It is thus central to the success of the concept of appellate sentence review that excessively lenient sentences also be subject to review, *i.e.*, that the prosecution be permitted to appeal a sentence that is too low. Thus reform proposals have often included a right to appeal by the government. See P. O'Donnell, *et al.*, *supra*, at 63; *New York Times*, April 23, 1980, at A26 col. 1. As a result of public hearings and consultation with members of the bench and bar, the Judicial Conference of the United States has concluded in a message sent to Congress that "there should be a right to seek leave to appeal [sentences] by both the defendant and the government." Letter of March 29, 1977, from Rowland F. Kirks, Director, Administrative Office of the United States Courts to the President of the United States Senate, accompanying a proposed bill to amend Rule 35 of

the Federal Rules of Criminal Procedure.[25] Although appellate sentence review is a fairly new concept in the United States, it is not unusual in other common law countries, and those countries often permit appeal by the prosecution. See page 27, *supra*. And "[i]n European systems it is taken for granted that the appellate court has power to correct errors both ways, except that many of the Codes of criminal procedure deny the court the power to increase sentences when only the defendant has appealed," as does 18 U.S.C. 3576. *Working Papers of the National Commission on Reform of Federal Criminal Laws* 1476 (1971).

Permitting the government to appeal a sentence is a sound legislative action aimed at ameliorating the general unfairness caused by disparities in sentences. If the Congressional decision to permit prosecutorial appeal of sentence in specified classes of cases is struck down, other means of attacking the problem of excessively lenient sentences will be sought. The alternatives to appellate review for coping with the problem are much less satisfactory, not only from the standpoint of society but to some extent from that of defendants as well. If sentence appeal is a one-way street, it is possible that some judges will err on the side of imposing sentences that are too long, knowing that they can be reduced on appeal but not increased. See *Walsh* v. *Picard*, *supra*, 446 F.2d at 1212; P.

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[25] We have been unable to locate a published source for this letter and accordingly have appended it hereto as Appendix A.

O'Donnell, *et al.*, *supra*, at 63; cf. *United States* v. *Tateo*, *supra*, 377 U.S. at 466. Even more likely is that Congress will intervene, as it did in passing 18 U.S.C. 3576. If appellate review is unavailable to control the unduly light sentences given to certain classes of offenders, the obvious alternative for Congress is to control these sentences directly by imposing substantial mandatory minimum sentences. That approach, of course, would have the unfortunate effect of reducing the flexibility that trial judges require for determining an appropriate sentence for a particular crime. See, *e.g.*, *Williams* v. *New York*, 337 U.S. 241, 247 (1949). The result might well be many harsh sentences to offenders for whom more lenient treatment would be appropriate. In sum, we think it apparent that interpreting the Double Jeopardy Clause to prohibit prosecutorial appeal of sentences would advance neither the interests of rational sentencing policy nor those of the class of convicted defendants.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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MAY 1980

APPENDIX A

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

SUPREME COURT BUILDING
WASHINGTON, D.C. 20544

Rowland F. Kirks
Director
William E. Foley
Deputy Director

March 29, 1977

Honorable Walter F. Mondale
President, United States Senate
Washington, D. C. 20510

Dear Mr. President:

At the direction of the Judicial Conference of the United States, at its session on March 10-11, 1977, I am transmitting herewith a proposed bill to amend the Federal Rules of Criminal Procedure to provide for appellate review of sentence in certain circumstances.

The Judicial Conference has over a period of years through its Advisory Committee on Criminal Rules considered and circulated among the bench and bar of the nation and held public hearings on a proposal regarding appellate review of sentences. As a result the Conference has concluded that there should be an opportunity for review of a criminal sentence of a year or longer in the courts of appeal and that

there should be a right to seek leave to appeal by both the defendant and the government.

In the normal course, proposed rules are forwarded by the Conference to the Supreme Court for promulgation by the Court. If promulgated, they are forwarded to the Congress and take effect in due course in the absence of a congressional veto. In the present instance, however, there is general agreement that affirmative congressional action is required to provide for a right of appeal by the government. There is also agreement that the details of the procedures are appropriately dealt with by a rule and that review at the instance of either the defendant or the government should be dealt with in integrated fashion in a single rule.

Accordingly, the proposed bill is forwarded for the consideration of the Congress. Representatives of the Conference and its committees will, of course, be pleased to be of assistance in the consideration of this proposal.

Sincerely,

/s/ Rowland F. Kirks
ROWLAND F. KIRKS
Director

Enclosure

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